

Modernization of Approvals

Inter-jurisdictional Comparison of Alternative Approval Methods: Overview and Best Practices

PIBS# 7586

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1. INTRODUCTION

Ontario is transforming the environmental approvals process by creating a more efficient, user-friendly approach that remains fully protective of the environment. To this end, the Ministry of the Environment (MOE) commissioned a study to research, assess, analyse and report on approvals programs in comparative regulatory environments in other jurisdictions. Specifically the MOE is concerned with how leading jurisdictions manage the higher risk/more complex approval applications, including how these are processed by the government body that issues environmental approvals.

The first step of the study was to determine what jurisdictions would be of interest to Ontario. Forty-two jurisdictions in Canada, the United States (US), Europe, Australia and New Zealand were initially identified. The following information was sought for each jurisdiction:

- Evidence of comprehensive, innovative or interesting approaches to permitting based on risk.
- Evidence of comprehensive, sound approaches to including rule-based permit types.
- Evidence of permitting practices/approaches that enhanced compliance or improved process efficiency, effectiveness or timeliness.
- Evidence of comprehensive, innovative or interesting approaches to public involvement.

Of the initial 42 jurisdictions identified, 16 jurisdictions were selected for more detailed research. This number was eventually narrowed to 12. The 12 jurisdictions are:

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|-------------------|---------------------|----------------------|
| 1. Alberta | 5. California | 9. Scotland |
| 2. Michigan | 6. Minnesota | 10. Oklahoma |
| 3. United Kingdom | 7. Washington State | 11. New York State |
| 4. Texas | 8. New Jersey | 12. British Columbia |

2. STUDY OUTLINE

A standard set of topics/questions was researched (by internet, email, and phone interview) for each of the 12 jurisdictions based on their practices of interest (see Appendix A for the full list of the standard topics/questions).

These topics/questions can be summarized into eight over-arching themes:

- Risk/Tier-Based Approaches to Permitting
 - Whether and how permits are organized into levels or “tiers” based on the complexity of the permit and/or risk.
- Rule-based Systems
 - What are the features of permits based on standard sets of rules and conditions (no customization), where the permission is granted if applicant meets criteria and agrees to rules?

- Eco-based Approaches
 - Does environmental permitting take into account specific characteristics of the pollutants in the context of the state of the receiving bodies of air/water/ground (e.g. Pollutant-specific, Holistic/Ecosystem, Cumulative Effects, Sensitive Receivers)?
- Risk Assessment Features
 - Role of risk assessments/risk models/tools in permitting.
- Permitting Process Features
 - Features to enhance quality/efficiency (for permittees and/or regulator)
 - Permit Guidance Documents/Completeness Checking Aids
 - Electronic/Online Aids for Efficiency and Compliance
 - Use of Timeliness Standards
 - Single/Facility-Wide Permits
 - Streamlining initiatives.
- Managing Compliance
 - How is poor compliance defined?
 - How do jurisdictions manage issues of poor compliance for high risk and low risk activities with rules-based approvals?
 - What auditing processes have been established for low risk activities with rules-based approvals?
 - The use of fees/economic incentives/disincentives to achieve environmental benefits
 - How is compliance audited? The triggers and extent of these audits?
- Public Input
 - How do other jurisdictions consider public input?
 - To what extent and at what stage is stakeholder input a factor in the issuance of approvals?
 - What is the role of appeals of permitting decisions? Are third party appeals possible?
- Lessons Learned/Desired Changes
 - How are the permitting practices viewed by the public and the regulated community?
 - What do jurisdictions view as the strengths and weaknesses of its assessment approach?
 - Lessons learned - what changes/improvements underway or would be helpful?

3. OVERVIEW AND BEST PRACTICES

Below is an overview and best practices for the jurisdictions that were surveyed for the eight topics listed above.

3.1 Risk/Tier-Based Permitting Regimes

All the jurisdictions surveyed employed some form of segmentation of permit types, according to the environmental risk or the complexity of the activity being permitted.

In most of the jurisdictions surveyed, the permits do not directly incorporate the risk associated with the activity or the facility. However, there is an indirect inclusion of risk through volume thresholds and/or specialization of permit types.

Each jurisdiction that uses risk/tier-based permitting decides how many tiers to create and how to apply them to the various media (e.g. air, waste, land, water). The jurisdictions use different terms to denote the various tiers which could range from a tier for specialized activities, a general tier that covers all facilities of a certain type (e.g. Permit-by-Rule) or a lower tier that just requires registration. In all the jurisdictions surveyed, an exempt tier always existed. The tiers also varied based on the media. It was evident that all activities could not be compartmentalized so there was usually a tier for specialized projects.

British Columbia (BC) has a three-tiered approach for waste discharge to air, land or water (air emissions, effluent discharge and waste discharge) which is based on risk:

- The first tier is for complex or unique activities that require detailed technical review and customized approvals.
- The second tier is for moderate risk activities and requires registration with the Ministry of Environment and following a code of practice or regulation.
- The last tier is for the lowest risk activities and exempts those activities from any formal approval requirements.

The United Kingdom (UK) has a robust qualitative risk assessment process to develop the risk criteria for activities subject to Standard Permits and to produce the standard rules for those activities.

A common, best practice approach would be to create a flexible regulatory framework that allows for the gradual addition of one or two types of permits that incorporate standard or rules-based features, e.g. Permit-by-Rule and General Permits. Then, new permit types can be added over time, and any vehicles that they replace can be retired as each permit expires or according to some other schedule. Also, regardless of the number of tiers or types of permits, the permits need to be clear and consistent on the practical requirements.

Another best practice would be to initially focus efforts into improving/developing processes for activities/facilities that are numerous (i.e. more common – risk not relevant). Last efforts should be for potentially high-risk but less common activities/facilities as those will likely require a specialized permit (with individualized conditions, for example).

3.2 Rule-based Systems

A rule-based permit defines a standard set of rules and conditions for particular types of facilities or activities with no customization of the rules to suit an individual facility or activity. If the applicant meets eligibility criteria for the permit, and agrees to follow the standard rules for the activity/facility, then the permit is often granted (subject to potential reporting and other requirements).

Rule-based approaches to permitting have common features:

- Set, objective criteria for eligibility (typically, a common type of facility and volume threshold of pollutants);
- Standard conditions for standard activities/facilities (i.e. limited or no custom conditions);
- Granting of the permission is “automatic” assuming that the application is eligible, complete and accurate, the applicant agrees to abide by the conditions, and any required fees are paid.

Jurisdictions that employ rule-based approaches tend to select 1-3 tiers, representing increasing complexity and risk. For example, the California Integrated Waste Management Board uses a three-tier system (above excluded activities) with increasing requirements for applications (e.g. public consultation, technical requirements, approval authority).

Since the mid-1990s, Alberta Environment has moved from an approvals-based system to a more differentiated system featuring notification and registration, and associated Codes of Practice for each. There are currently 26 Codes of Practices in use.

The 12 jurisdictions view the use of one or more rule-based tiers positively. The tendency of all the jurisdictions is to expand the use of rule-based approaches. There are some concerns about compliance monitoring, however, compliance can be enhanced using methods that do not solely rely on mass inspections (e.g. via requirements for reporting, and risk-based approaches to inspections).

3.3 Eco-based Approaches

Several eco-based approaches were evident during the jurisdictional scan. Jurisdictions used approaches which considered:

- Emission levels (pollutant-specific): Level of emissions commonly used to determine level of permit required.
- Cumulative effects: This is often used to cap allowable emissions levels in a particular area.

- Sensitive receivers: Quality standards based on characteristics of the receiving body (e.g. airshed, watershed).
- Health risk criteria: Assessment of impact of proposed pollutant source in human health

The New Jersey Department of Environmental Protection uses a risk-based approach to evaluate potential health effects from facilities seeking permits to emit air toxins. The approach uses unit risk factors and reference concentrations in a risk-screening process. The tools are available online.

The use of these eco-approaches offers environmental benefits. The minimum level of usage is determined by having pollutant-specific thresholds that governs either the type of permit required or the conditions of the permit, or both. All the surveyed jurisdictions employed this, and many went beyond the minimum in at least some areas.

All the jurisdictions surveyed considered all of the eco-based approaches to be leading and environmentally beneficial.

3.4 Risk Assessment Features

Formal risk assessment may also play a role in the design of the permit system, i.e. how permit types and conditions, tier structure, processing etc. are initially set up. A jurisdiction generally assesses two types of risk as part of permitting: environmental risk and compliance risk.

Environmental risks are the inherent risks of the emissions of the activity of the facility. Compliance risk is the likelihood of a permit holder being in non-compliance with the conditions of the permit. The most comprehensive approach is for a jurisdiction to consider these two types of risk together, i.e. as a matrix, such that high environmental risk + high non-compliance risk forms the end of the spectrum most in need of tight regulation and compliance monitoring. The low end (little environmental risk + little risk of non-compliance) may require less strict conditions and very limited compliance monitoring. BC does this.

Some jurisdictions apply more than one approach. Different approaches may be used for air versus water permits, for example, or for different levels of permit. The more formal assessments of risk, where they exist, tend to be in air (where volumes and receiving bodies are potentially very large), and water, where the chemistry of interactions is complex and there can be high sensitivities to some pollutants.

Similar to the employment of pollutant-specific, holistic, ecosystem, cumulative aspect approaches, the use of formal risk assessment is a “best practice”, seen by practitioners as efficient and beneficial in terms of environmental protection.

Of the jurisdictions surveyed, the UK offers the most comprehensive approach to risk assessment which features a rating scheme that is applied at all levels, includes compliance and environmental risk, and has fees integrated into the ranking. The UK incorporates risk assessment as part of its fees structure – i.e., higher risk activities must pay higher fees for environmental permits. This approach is still relatively new, having only been implemented in

April 2009. As such, it may be too early to say if the significant effort put into its design and implementation will yield substantial environmental and/or compliance-enhancement benefits over a simpler and less comprehensive system.

3.5 Permitting Process Features

Several features of the permitting process were similar across the jurisdictions that were surveyed. This included the provision of permit guidance documents, online aids, timeliness standards, single/facility wide permits and streamlining initiatives.

Permit guidance documents provide information on when a particular permit (or registration etc.) is required and/or how to complete an application. These types of documents are commonly provided on-line. Agencies provide completeness checking aids to support the applicant's full and accurate completion of an individual application. While usually time-consuming to develop, if done properly, it can bring structure, clarity and consistency to applications.

Many of the jurisdictions provide checklists, often in the form of Qs & As, or sample completed forms, to assist an applicant in preparing a "complete" submission. Those that did not produce these materials thought they were a good idea. Michigan provides an online checklist, which includes key questions to help an applicant determine what departmental permits, licences, or approvals of a permit-like nature may be needed for a project. The purpose of this online aid is to reduce the possibility that a project or activity will be delayed due to the untimely discovery of additional permitting requirements later in the process.

All jurisdictions reported positively in regards to e-submission of applications and wanted to start or expand its use. Some jurisdictions reported issues with uptake, and had to use inducements (quicker turnaround and/or reduced fees) to encourage uptake. A jurisdiction must still accept paper forms; therefore some duplication of process is likely. In some case, to encourage e-submission, a jurisdiction would lower the fees (e.g. Scotland) or shorten the review time for electronically-submitted applications.

It is seen as a best practice to leverage online abilities to provide guidance, documents, compliance support, and submit applications and monitoring data/reports. Increased online use is planned and seen as beneficial in all surveyed jurisdictions. New permit types/tiers need to be well-supported with online resources and well-supported internally with clear reference materials/training etc. Not doing so results in lower quality/incomplete applications that require rework in the evaluation stage. "Implement now, support later" is a poor practice.

Many jurisdictions set timelines for the review of applications, including timelines for determining administrative and technical completeness, rendering a decision, and gathering public input. Different timelines standards are often set for different type/level of permit, if appropriate. Michigan incorporates all of the above features as part of establishing timelines and service guarantees for permitting.

Single, site-wide, multi-media permits have had mixed success in various jurisdictions. There has been issues around silos and the complexity of the permits. Specialized cross-media permits exist for common situations, or single permits within one media (e.g. one air permit per facility). The UK has multi-media and site-wide permits for all but the most complex applications. A best practice is the establishment of cross-media teams to ensure the applicant has “one-window” access to the regulator.

From time to time, agencies undertake streamlining initiatives, to improve permitting processes. Most of the jurisdictions surveyed had current or relatively recent streamlining initiatives. All reported some history of streamlining. The impetus was often a result of the desire to improve the consistency and efficiency of the permitting process in a cost-effective/cost-recovery way. In California, the Air Resources Board passed the *Air Pollution Permit Streamlining Act*, which led to various innovations and improvements in the way air permit process was administered.

3.6 Managing Compliance

Compliance is required at both the approval and the operational stages of a facility. In all jurisdictions, the first priority of managing compliance is to bring violators back into compliance before taking any punitive steps. Also, requiring permit holders to maintain certain types of records and periodically submit reports to the regulator was seen as a good compliance-enhancing approach.

Some jurisdictions institute a self-disclosure program to encourage companies to voluntarily come into compliance. The US Environmental Protection Agency (EPA) has a self-audit program under the EPA Audit Policy. The EPA Audit Policy is designed to provide incentives for regulated entities to come into compliance with the federal environmental laws and regulations. These incentives are for regulated entities that voluntarily discover, promptly disclose and expeditiously correct noncompliance, making formal EPA investigations and enforcement actions unnecessary.

The jurisdictions surveyed either relied on targeted monitoring/inspections based on a particular sector (e.g. New York has a program to actively inspect the dry cleaning industry) or has regularly scheduled inspections (e.g. annually). As jurisdictions reported that it was difficult to inspect all facilities on a regular basis, invariably, the facilities inspected and the frequency of inspection was tied to risk (indirectly in some jurisdictions that did not take a direct risk-based approach to permitting).

In Texas, a facility’s compliance history plays a role in how a company is allowed to conduct its business. For example, a “poor performer” might not be able to renew existing permits or obtain new ones, surprise inspections may occur, and there will be higher enforcement penalties.

Most jurisdictions view full cost recovery as a best practice. The UK incorporates risk assessment as part of its fees structure – i.e., higher risk activities must pay higher fees for environmental permit and uses risk assessments to determine compliance activities.

The Department for Environment, Food and Rural Affairs (UK) has a very comprehensive approach to risk assessment, via the Operational Risk Appraisal (Opra) which provides an objective and consistent assessment of the environmental risk of operating a regulated facility. Attributes considered are complexity, emissions and inputs, location, operator performance and compliance rating. Opra is primarily used to prioritize compliance enforcement activities and to set permit fees. It does not have a direct effect on the permit process itself. A poor Opra rating does not in itself make a permit more difficult to obtain, or require a different level of permit.

3.7 Public Input

Public input (through comments submitted, meetings, appeals) into the decision-making process for large facilities was prevalent across the jurisdictions surveyed. Public input is also often sought in the “rule-making” exercise though there is usually little public interest.

The jurisdictions surveyed report that, barring the occasional high profile facility, there is little public interest at the permitting stage – the bulk of the public interest is at the Environmental Assessment or Impact Assessment phase, before the facility is built, especially at the stage where land use/zoning decisions are being made.

Third-party appeals were common, though Texas and Alberta limited appeal rights to “directly affected” persons.

Best practices include making it clear when and how the public can input into the decision-making process. In the jurisdictions surveyed, this has been done through providing information on the regulator’s web site about applications that have been submitted and providing information and guidance about the public input process.

In those jurisdictions where the public input process was more formalized, the permitting process was outlined with clear details about when and for how long public input was to be sought and what the applicant was to do with any comments that were submitted.

The Washington Department of Ecology keeps a Permit Register to track permit actions, including opportunities for public involvement. All actions that have been taken on a source’s permit application are in the Permit Register. This includes completion of the draft and final permit, the scheduling of hearings and public meetings, and changes to the permit. A person can have their name added to the Permit Register’s mailing list. A new Permit Register is published on the 10th and 25th of each month, or the nearest business date.

3.8 Lessons Learned/Desired Changes

The following information was gleaned mostly through discussions with representatives from the various jurisdictions.

Issues/Lessons

- “Streamlining is always on the agenda”. Current focus of streamlining effort is typically on electronic applications.
- Most jurisdictions expect to expand their rules-based tiers.
- Lesson: Adequate IT funding – Pressure exists to migrate to electronic submission and processing of permit applications and associated reporting, however inadequate IT staffing levels inhibit efficient programmatic improvements.
- Lesson: Consolidate permit application databases by importing relevant historical data into the current data management system.
- Issue: Lag time between new rules and the resources and implementation tools necessary to support them (for both applicants and permit reviewers), leads to deficient applications and subsequent re-work during technical review period.
 - To improve: Strong implementation planning approach – supports and tools are on the critical path for implementing new rules/permits.

Changes Planned

The following is a summary of perspectives provided by representatives of the jurisdictions contacted, regarding desirable changes to their process, and about trends, issues, pressures and any “lessons learned”.

Desired improvements:

- Electronic forms, especially smart forms (with data validation).
- Electronic service delivery.
- Targeted inspections.
- Tools to support efficient and effective inspection.
- Permit standardization (within each tier/type).

APPENDIX A: RESEARCH TOPICS

The intent of the study is to determine how each jurisdiction would:

- evaluate different regulator frameworks or approaches – whether laid out in legislation or regulations – that permit different levels of evaluation of applications for approval on the basis of environmental risk, complexity of undertaking and application, or some other set criteria;
- indicate whether legislation and regulations define a higher risk or more complex category and describe the approvals process that it supports including the extent to which applications are individually scrutinized;
- assess how other jurisdictions consider public input in order to promote transparency in decision making;
- determine whether other jurisdictions identify specific activities, sectors by which approvals may be channelled to different approvals streams which may include different approaches to processing the approvals applications;
- indicate whether other jurisdictions apply economic incentives/disincentives to their approvals programs to achieve environmental benefits;
- examine the nature of approvals issued including providing a high-level process flow.
- address the following questions with regard to the jurisdictions:
 - Are approvals issued by rule? If so, what are the rules? What is the mechanism of rule application? Do low risk categories require some form of a registration process? Can the activity proceed as long as the rule is met?
 - Where rules based approvals exist, the report should provide a detailed summary of the types of operational parameters/reporting or other requirements placed on the applicant. For example, are technical assessments, audits, reports, or other activities/products required?
 - Are approvals media specific? Are low risk and high risk categories treated differently?
 - Are they pollutant specific?
 - How do approvals deal with sensitive pollutant receivers or other issues of location?
 - How do approvals deal with cumulative effects?
 - Do approvals apply an ecosystem approach?
 - Are single approvals issued for single facilities or for multiple facilities? Are low risk and high risk categories treated differently?
 - To what extent and in what situations do approvals issued allow operational flexibility? How has the operational flexibility been provided for within the regulatory framework?
 - To what extent and at what stage is stakeholder input a factor in the issuance of approvals? This should include information regarding input by the public or other levels of government, neighbouring jurisdictions (if relevant) or others to the issuance of approvals;
- determine what types of auditing processes have been established for low risk activities with rules based approvals;

- examine how other jurisdictions manage issues of poor compliance for low risk activities with rules based approvals
 - how is poor compliance defined?
 - what happens when a significant poor compliance situation is identified at a facility operating with a low risk rule based approvals category?
- examine how other jurisdictions manage issues of poor compliance for high risk activities;
- examine how other jurisdictions provide for the updating of approvals to reflect advancing policy and standards including but not limited to time-limited or renewable approvals.
- indicate whether compliance with terms laid out through approvals is audited and the triggers, the nature and the extent of these audits;
- assess the use of technology in the receipt of applications, payment and the issuance of approvals for high-risk or complex projects;
- comment on the success of particular approvals methods/processes/applications as perceived by different stakeholders; and
- examine the use of legislated turnaround times and administrative service level guarantees in the approvals programs.